

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NORTHERN MICHIGAN TITLE CO. OF  
ANTRIM-CHARLEVOIX,

Plaintiff-Appellant,

v

DEBRA BARTLETT, DONNA DOHM, MAURA  
SNABES, CORPORATE TITLE AGENCY-  
CHARLEVOIX, LLC, CORPORATE TITLE  
AGENCY-CHARLEVOIX, INC., and  
CORPORATE TITLE & ESCROW COMPANY,  
INC.,

Defendants-Appellees.

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UNPUBLISHED  
March 15, 2005

No. 248751  
Charlevoix County Circuit Court  
LC No. 02-153319-CK<sup>1</sup>

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

In this case arising from employment contracts, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm.

I. Basic Facts

Debra Bartlett began working for plaintiff in the 1980s as a paralegal. She later became involved in the management of the company and ultimately held the position of president. Donna Dohm began working for plaintiff in 1990. Dohm eventually became vice president and, after Bartlett resigned, president of the company. Maura Snabes began working for plaintiff in 1994. She performed title examinations, issued commitments and policies and attended closings. She also functioned as plaintiff's legal counsel. At some point, each of these defendants signed an employment contract, which included a noncompete clause and a confidentiality agreement.

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<sup>1</sup> The trial court entered an order consolidating Docket Nos. 02-153419-CK and 02-153519-CK with this case.

Bartlett resigned in March 2001. Dohm and Snabes resigned in April 2002. Soon after resigning, all three began working at Corporate Title Agency (CTA)<sup>2</sup>. Plaintiff filed three complaints “for injunctive and other relief” alleging that Bartlett, Dohm, and Snabes breached the noncompete agreement because they began working for CTA within one year of resigning. Plaintiff also alleged that they breached their fiduciary duties by using plaintiff’s “trade secret, confidential and/or proprietary information” for their own benefit. Plaintiff also alleged against CTA, Bartlett, Dohm and Snabes tortious interference with employment contracts, breach of duty under the Michigan Uniform Trade Secrets Act, MCL 445.1901 *et seq.*, tortious interference with business relations and contract, and civil conspiracy.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendants argued that the noncompete clauses were unenforceable because MCL 445.774a only permits noncompete agreements that “protect an employer’s reasonable competitive business interest.” Defendants argued that the agreements do not protect a “reasonable competitive business interest,” but rather, protect plaintiff from competition itself. Defendants also argued that the business of title insurance has no trade secrets. Bartlett also argued that her employment contract containing the noncompete clause was superseded by a subsequent employment contract without such a clause.

In response, plaintiff argued that defendants had access to and were using “trade secrets” and “confidential information.” Plaintiff argued that defendants could use their knowledge about how plaintiff’s tract system was superior to CTA’s to improve CTA’s system. Plaintiff also argued that defendants’ knowledge of “clients” habits, preferences, and personal matters, enabled them to take business from plaintiff. Plaintiff also argued that defendants knew of the strengths and weaknesses of plaintiff’s finances and employees. Plaintiff argued that these things gave CTA an unfair competitive advantage. Plaintiff also requested that the trial court order Bartlett, Dohm, and Snabes to return the bonuses they received pursuant to their contracts if the contracts were determined to be void.

The trial court granted defendants’ motion for summary disposition. The trial court determined that the noncompete clauses were unenforceable under MCL 445.774a because “general knowledge, skill or facility acquired through training or experience while working for an employer appertain exclusively to the employee” and a legitimate business interest must be something greater than mere competition. The trial court determined that there were no trade secrets, customer lists, or pricing information that the defendants used to unfairly compete and defendants were not using plaintiff’s tract system. The trial court granted summary disposition on all of plaintiff’s claims “because they depend entirely upon the enforceability of th[e] noncompetition agreement[s].”

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<sup>2</sup> We refer to Corporate Title Agency-Charlevoix, LLC, Corporate Title Agency-Charlevoix, Inc., and Corporate Title & Escrow Company, Inc. collectively as “Corporate Title Agency” (CTA).

## II. Standard of Review

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants filed their motion pursuant to MCR 2.116(C)(8) and (C)(10). Because the trial court looked beyond the pleadings in deciding the motion, this Court reviews the motion as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *Downey*, *supra* 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court considers the documentary evidence presented to the trial court in the light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc, (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001).

## III. Noncompete Clauses

### A. Bartlett

Although the 1990 employment agreement between plaintiff and Bartlett contained a noncompete clause, plaintiff admits that Bartlett entered into a new agreement in October 16, 1998 that does not include a noncompete clause. "When two agreements cover the same subject matter and include inconsistent terms, the latter agreement supercedes the earlier agreement." *CMI Intern Inc v Internet*, 251 Mich App 125, 130; 649 NW2d 808 (2002). Because both agreements address the terms of Bartlett's employment by plaintiff, we conclude that the latter agreement, without the noncompete clause, supercedes the earlier agreement. Plaintiff argues that whether the latter agreement "was intended to replace the prior agreement is a disputed issue of fact." But courts may look to extrinsic evidence only to clarify a contractual ambiguity. *Stine v Continental Casualty Co*, 419 Mich 89, 112; 349 NW2d 127 (1984). Plaintiff does not present any argument that there is contractual ambiguity. Therefore, we conclude that the trial court properly granted summary disposition of plaintiff's claim that Bartlett breached the noncompete clause even though it granted the motion for the wrong reason. "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Mich Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

### B. Dohm and Snabes

Dohm's and Snabes' employment agreements each include a noncompete clause, which provides:

2. That upon termination of the Employee's employment voluntary or involuntary, with or without cause, the employee agrees and promises not to engage in the title insurance business in Charlevoix County, Michigan for a period of five (5) years directly or indirectly, either individually, as a partner, as a stockholder in a corporation, as any other type of investor, or as an agent, employee, representative or consultant or through a relative.

It is undisputed that soon after resigning, Dohm and Snabes began working for CTA, thereby breaching their noncompete agreements.

But defendants argue that the noncompete clause is unenforceable pursuant to MCL 445.774a, which provides:

(1) An employer may obtain from an employee an agreement or covenant which protects an employer's *reasonable competitive business interests* and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

The parties do not differ with respect to the meaning of the statute, rather, they differ regarding the result of applying the plain language of this statute to the noncompete clause. Because the statute requires inherently fact specific and circumstantial determinations, we must determine whether the noncompete clause protects plaintiff's "reasonable business interest" considering plaintiff's particular business.

Under the circumstances of this case, plaintiff's noncompete agreement is unenforceable because it does not protect plaintiff's "reasonable business interest." Because the agreement completely prohibits Dohm and Snabes from engaging in title insurance business (within a specified time and place), it serves to protect plaintiff from competition itself. The noncompete agreement would be enforceable if it served to protect plaintiff from an unfair competitive advantage in the title insurance business. But an unfair advantage cannot arise from the employee's use of general knowledge or skill gained in working for the employer.

This application of MCL 445.774a is in keeping with the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.* as a whole. As stated in *Bristol Window v Hoogenstyn*, 250 Mich App 478, 485 (2002),

Section 2 of the MARA, MCL 445.772, which was derived from the Uniform State Antitrust Act, sets forth the following general proposition: "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."

MCL 445.774a, specifically addresses covenants not to compete between employers and employees. Thus, reading these two sections *pari materia*, we conclude that a noncompete agreement that protects an employer's "reasonable competitive business interest" must not restrain or monopolize trade or commerce.

This application is also in keeping with Michigan common law. MCL 445.774a is not a derogation, but rather, a codification of the common law on noncompete agreements. As noted in *Bristol*, "Long ago, before any statutory scheme of business regulation existed in Michigan, a common-law rule of reason governed what constituted a permissible restraint of trade." *Bristol*,

*supra* at 486, citing *Hubbard v Miller*, 27 Mich 15, 16-17 (1873). *Bristol* made clear that 445.774a was merely a codification of the common law “that the enforceability of noncompetition agreements depends on their reasonableness.” *Id.* at 495.

In *Follmer Rudzewicz & Co v Kosco*, 420 Mich 394; 362 NW2d 676 (1984), our Supreme Court further explained that the reasonableness of noncompetition agreements depends upon the type of information that the employee is restricted from using. The Court held:

While an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable, confidential information, including information regarding customers constitutes property of the employer and may be protected by contract. [*Id.* at 402 (footnotes omitted).]

In so holding, the Court noted:

“It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain exclusively to the employee. The fact that they were acquired or developed during the employment does not, but itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive and costly.” [*Id.* at 402, n 4, quoting Blake, *Employment Agreements Not to Compete*, 73 Harv L Rev 625, 652 (1960).]

In this case, the noncompete clause completely prohibits Dohm and Snabes from engaging in the title insurance business. It does not narrow the focus of the prohibition to prevent unfair competition. Under these circumstances, Dohm and Snabes would not be permitted to obtain referrals from sources that had never had a relationship with plaintiff. Nor would they be permitted to offer title insurance services to clients who never had or never would have given business to plaintiff in the first place. In any event, according to the record, there are seldom repeat clients in the title insurance business. The business itself is mainly developed through referral sources, of which there are many and which are readily identified in any given community. But any referral source should be free to choose a title insurance company. Even if the noncompete agreement specifically prohibited Dohm and Snabes from soliciting business from referral sources with which plaintiff had developed relationships, the agreement between plaintiff and Dohm and Snabes could not prevent the referral sources from contacting Dohm and Snabes.

Thus, aside from using plaintiff’s confidential information while conducting title insurance business, there is nothing about defendants’ employment in the title insurance business generally that gives them an “unfair advantage” over plaintiff. Although the parties appear to have blended plaintiff’s claims, the claims that Dohm and Snabes breached their confidentiality agreements are distinct from the claims that they breached their noncompete agreements. Therefore, we address the latter below.

Plaintiff also argues that if this Court determines that the noncompete clause of the employment agreements is unenforceable, it must order defendants to return their bonuses, which they obtained pursuant to the agreements. But we have not determined that the employment

agreements are unenforceable, only that the noncompete clause is unenforceable. Generally, the failure of a distinct part of a contract does not void valid, severable provisions. *Samuel D Begola Services, Inc, v Wild Bros*, 210 Mich App 636, 641; 534 NW2d 217 (1995). The primary consideration in determining whether a contractual provision is severable is the intent of the parties. *Id.* Our Supreme Court has explained as follows:

Two principal factors are considered: first, "whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other"; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed), § 532, p 764. However, "even though the consideration for each agreement is distinct, if the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded . . . as entire and not divisible." *Id.*, p 765. [*Dumas v Auto Club Ins Assoc*, 437 Mich 521, 616-617, n 87; 473 NW2d 652 (1991).]

In this case, the noncompete clause in each employment contract is severable from the rest of the contract. The contracts establish the terms of the employment relationships. Despite the unenforceability of the noncompete clause, the parties still had employment relationships that were governed by the employment contracts. With respect to the bonuses, the contracts provide: "The Employer has heretofore voluntarily established a 'bonus' policy with distributions to employees based on merit and Employer profitability." Because the bonuses were based on performance, we cannot conclude that the bonuses were tied in such a significant way to the noncompete clause that the bonus provision must be rendered unenforceable as well. Therefore, it does not follow from our determination that the noncompete clause is unenforceable that Dohm and Snabes must return the bonuses they received from plaintiff during the course of their employment.

#### IV. Confidentiality Agreements

Plaintiff also alleged that Bartlett, Dohm, and Snabes breached their agreements to keep confidential all of plaintiff's "trade secrets, confidential and/or proprietary information." Specifically, plaintiff alleged that defendants breached this agreement by "using and/or disclosing to [CTA] [plaintiff's] trade secrets, confidential and/or proprietary information." The trial court did not err in dismissing this claim because, beyond mere conjecture, plaintiff has produced no evidence whatsoever that defendants have used or disclosed this information to CTA or anyone. In *Smith v Globe Life Insurance Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), our Supreme Court clarified the proper standard under 2.116(C)(10):

Under 2.116(C)(10), it is no longer sufficient for plaintiff's to *promise* to offer factual support for their claims at trial . . . . [A] party faced with a motion for summary disposition brought under 2.116(C)(1) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted.

Plaintiff's argument simply assumes that because Bartlett, Dohm and Snabes had access to confidential information that they must necessarily be using or disclosing it if they are working for CTA. But the mere fact that defendants have or at one time had this information in their minds is not sufficient evidence to support plaintiff's claims.

Plaintiff argues that defendants' knowledge of plaintiff's tract system, its strengths and weaknesses, will allow CTA to gain an unfair advantage. Plaintiff cites Bartlett's deposition testimony that CTA's tract system is inferior to plaintiff's and that she has discussed improving CTA's system. But even without knowledge of plaintiff's tract system, CTA could develop an improved system. Thus, upgrades and improvements to tract systems are elements of normal competition that do not depend on the knowledge of competitors' tract systems. The mere fact that Bartlett testified that she discussed improving CTA's tract system is not sufficient evidence to support plaintiff's claim that defendants misused or disclosed plaintiff's confidential information.

Plaintiff also argues that defendants used knowledge of closing agents', title examiners', realtors', bankers', and lawyers' "habits, preferences, and personal matters, such as the identities of their spouse, family members and hobbies (i.e., whether they like to golf, fish, hunt, etc.)" to "take business from" plaintiff. Plaintiff has failed to present any evidence that defendants used or disclosed this information in working for CTA. But even if there was evidence that they did, Berlage acknowledged that referral sources (Plaintiff refers to them as "clients.") are easily identified by joining local clubs or a telephone directory. Furthermore, the habits and likes of referral sources could also be obtained by anyone, in the title insurance business or without, and is surely known by more people than plaintiff's employees or defendants. To the extent that the habits and likes of referral sources were particular to the way business was conducted, any competitor could be exposed to this information through general inquiry or through a single business transaction.

Plaintiff also argues that defendants' knowledge of "employee salaries, bonuses, and benefits," plaintiff's "revenues and expenses," business plans, capital investments, and hiring policies would allow them to "evaluate the strengths and weaknesses of [CTA's] system." But, again, there is no evidence that defendants used this information in working for CTA.

Because plaintiff failed to produce any evidence indicating that Bartlett, Dohm, and Snabes have used or disclosed plaintiff's confidential information in working for CTA, the trial court did not err in granting summary disposition of these claims.

## V. Plaintiff's Other Claims

Plaintiff also argues that the trial court erred in granting summary disposition of its claims of breach of fiduciary duty, civil conspiracy, tortious interference, and violation of Uniform Trade Secrets Act, MCL 445.1901 *et seq.* because none of them depended on the noncompete clauses. But plaintiff has failed, in responding to defendants' motion, to present any evidence that defendants used or disclosed plaintiff's confidential information or intentionally interfered with plaintiff's business or contractual relationships. Therefore, the trial court properly granted summary disposition of these claims.

## VI. Summary Disposition Premature

Plaintiff also argues that summary disposition was premature because discovery was incomplete on many disputed issues. We disagree.

Pursuant to MCR 2.116(G)(4), plaintiff was required to submit proofs in response to defendants' motion for summary disposition. Discovery cutoff was March 24, 2003. Defendants' motion for summary disposition was first scheduled to be heard on March 6, 2003, at which time the trial court adjourned the motion to give plaintiff the required time to respond. The hearing was rescheduled for April 25, 2003. Plaintiff filed its motion to compel discovery on April 17, 2003. Therefore, even if plaintiff's failure to support its response to summary disposition was due to defendants' objections to discovery requests, plaintiff contributed to this failure by filing its motion to compel several weeks after the discovery cutoff and one week before the rescheduled hearing date for the summary disposition motion. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Center v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996).

Affirmed.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Kirsten Frank Kelly